Supreme Court, U.S.
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No. 01-611

IN THE

Supreme Court of the United States

RONALD L. BROWN,

Petitioner,

v.

WHEAT FIRST SECURITIES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

PAUL GONSON
Counsel of Record
STEPHEN G. TOPETZES
REBECCA L. KLINE
ERIN K. ARDALE
KIRKPATRICK & LOCKHART LLP
1800 Massachusetts Ave., N.W.
Second Floor
Washington, D.C. 20036
(202) 778-9000

Attorneys for Respondents

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Balmar Legal Publishing Services, Falls Church, Virginia (703) 289-9000

QUESTIONS PRESENTED

At the first conference of the arbitrators and counsel for the parties, one arbitrator of a panel of three disclosed a tangential relationship to a lawyer in the law firm representing the Respondents. This disclosure was made after the period had expired for peremptory challenges to the arbitrator, but more than a year before the hearing. Ultimately, the arbitrators made an award in favor of the Respondents. The Petitioner sought to vacate the award on the ground of bias of the arbitrator.

1. Did the court of appeals err in refusing to vacate the award for the reason that the Petitioner failed to request an extension of time to make a peremptory strike of the arbitrator?

2. Did the court of appeals err in refusing to vacate the award for the reason that Petitioner failed to allege in the court of appeals that the connection with the law firm disclosed by the arbitrator would justify removal for cause?

STATEMENT PURSUANT TO RULE 29.6

First Union Corporation acquired Wheat First Securities, Inc. ("Wheat First") in January 1998. Wheat First is now operating under the name First Union Securities, Inc., a broker-dealer registered with the United States Securities and Exchange Commission.

First Union Securities, Inc. is a wholly owned subsidiary of Wachovia Corporation.

Wachovia Corporation is a publicly held interstate financial holding company, the shares of which are traded on the New York Stock Exchange under the symbol "WB." The corporation's subsidiaries provide banking and other financial services to individuals and institutions.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Contrary to Petitioner's argument, this case raises no question about the legal test for determining whether an arbitration award should be vacated on the basis of "evident partiality" of one of the arbitrators. In this case, the United States Court of Appeals for the District of Columbia Circuit articulated no such standard whatsoever. Instead, it ruled that Petitioner had not requested an extension of time to make a peremptory strike against an arbitrator, nor had Petitioner made any argument in the court of appeals justifying removal of the arbitrator for cause. Pet. App. 10.[1] For these reasons, the court of appeals rejected his claim that he was denied his right to exercise his peremptory strikes. Accordingly, this case presents no issue concerning whether a disclosure by an arbitrator of a relationship to one of the parties, made after the expiration of the period for peremptory challenges, is covered by this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), nor does it bear on the supposed conflicts among the courts of appeals on the standard for vacating an arbitration award where there has been no such disclosure by the arbitrator.

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[1] "Pet. ___" refers to pages of the Petition For Writ Of Certiorari. "Pet. App. ___" refers to pages of the Appendix attached to the Petition For Writ Of Certiorari. "D.C. Cir. Jt. App. ___" refers to pages of the Joint Appendix filed in the United States Court of Appeals for the D.C. Circuit. Citations to documents not contained in the above appendices state the formal title of the document.

STATEMENT OF THE CASE

1. Background

Respondent Wheat First Securities, Inc. ("Wheat First") is a regional, full service securities broker-dealer that is registered with the United States Securities and Exchange Commission ("SEC") and that is a member of the National Association of Securities Dealers, Inc. ("NASD"). Wheat First hired Petitioner Ronald L. Brown in November 1991 to work as a registered representative in its Washington, D.C. branch office. Pet. App. at 2. Upon joining Wheat First, Mr. Brown completed a standard registration form prescribed by securities regulators, called the Uniform Application for Securities Industry Registration or Transfer ("Form U-4"), which includes a pre-dispute arbitration clause. Pet. App. at 14-15.

Mr. Brown continued to work at Wheat First for over five years, until February 1997, when his employment was terminated.[2] Pet. App. at 2. On February 18, 1998, pursuant to his Form U-4 arbitration agreement, Mr. Brown instituted an arbitration proceeding by filing a Statement of Claim with the NASD's Office of Dispute Resolution against Wheat First alleging wrongful termination, breach of implied contract, defamation, slander and tortious interference. Pet. App. at 29. At that time, Mr. Brown also signed and presented to the NASD a Uniform Submission Agreement, in which he agreed to arbitrate his claims under NASD rules. Pet. App. at 3. He sought $25,000,000 in compensatory and punitive damages. Pet. App. at 3. In support of his wrongful termination claim,

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[2] *That same day*, Mr. Brown started a new position as a salesman at another Washington, D.C. area brokerage firm, where he remained for over two years. "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 8-10.

Mr. Brown alleged that Wheat First fired him for alerting the SEC to supposed illegal activities at Wheat First in 1996.[3] *Id.*

In July of 1998, a panel of three arbitrators was appointed under the NASD Code of Arbitration Procedure. One of the arbitrators assigned to hear Mr. Brown's claims was Wendie L. Wachtel. Pet. App. at 35. She is a principal of Wachtel & Co., Inc., a registered broker-dealer in the District of Columbia. Pet. App. at 10, 57.

At or about the time the NASD notified the parties that it had selected the members of the arbitration panel, the NASD distributed arbitrator disclosure forms to the parties in accordance with Rule 10312 of the NASD Code of Arbitration Procedure. Specifically, Rule 10312(a) requires each arbitrator "to disclose to the Director of Arbitration any circumstance which might preclude such arbitrator from rendering an objective and impartial determination [including any] existing or past financial, business . . . relationships or circumstances that are likely to affect impartiality or might reasonably create

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[3] The SEC conducted a surprise examination of Wheat First's Washington, D.C. branch office in December 1996, but took no action pursuant to this examination. Concerned about this perceived inaction by the SEC, Mr. Brown sent letters to U.S. Congressman Frank Wolf, the U.S. Department of Justice, the SEC's Philadelphia District Office and SEC Commissioner Laura Unger in which he accused various high-level SEC officials, including SEC Chairman Arthur Levitt, of corruption and incompetence with respect to the investigation of Wheat First. At the same time that he was sending these letters, Mr. Brown repeatedly refused to cooperate with the SEC voluntarily and even pursuant to subpoena. The United States District Court for the Eastern District of Pennsylvania eventually ordered him to comply with the subpoena under penalty of contempt. Mr. Brown and his then attorney also refused to cooperate with an investigation initiated by the Inspector General of the Federal Deposit Insurance Corporation into his allegations against high-level SEC officials, forcing it to close its investigation. "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 8-10.

The SEC has not instituted any action or proceeding against Wheat First related to Mr. Brown's alleged complaints.

an appearance of partiality or bias . . . with any party or its counsel . . . ." Pet. App. at 38. Subsection (c) of this Rule makes this disclosure duty continuing in the event that the appointed arbitrators later recall or discover circumstances requiring disclosure. Pet. App. at 38-39. Rule 10311 also provides that each party has ten days from the date on which the NASD makes the arbitrators' names and disclosure forms available to make a peremptory challenge to remove an arbitrator, unless that time is extended by the Director of Arbitration. Pet. App. at 36. Neither Mr. Brown nor Wheat First made any peremptory challenges during the course of the proceedings, Pet. App. at 10, nor did Mr. Brown ever request the Director of Arbitration to extend the time for him to make a challenge. *Id.*

At the first scheduling conference among the arbitrators and the parties' counsel on September 15, 1998, Ms. Wachtel disclosed the following: she is the account executive of a discretionary brokerage account of an individual partner of Kirkpatrick & Lockhart LLP, counsel for Wheat First, and more than ten years before the arbitration her firm acted as an investment banker for corporate issuers using Kirkpatrick & Lockhart (or a predecessor law firm) as securities counsel.[4] Pet. App. at 9-10, 57. At that time, Ms. Wachtel stated to the parties that the foregoing facts would not affect her ability to be fair and impartial. Pet. App. at 9-10, 57-58.

This disclosure was made months before the final hearing and more than a year before the arbitration award was issued. At the time of the disclosure, Mr. Brown's former

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[4] The relationship between Kirkpatrick & Lockhart LLP, a national law firm with over 650 attorneys in ten offices around the country, and Ms. Wachtel or her firm was characterized by the D.C. Circuit as "tangential." Pet. App. at 9. The Kirkpatrick & Lockhart partner whose account was handled by Ms. Wachtel has never played any role in any aspect of this case. Similarly, no lawyer who represented Ms. Wachtel's firm on investment banking matters more than ten years earlier at Kirkpatrick & Lockhart or a predecessor law firm was involved in any aspect of this case.

counsel could have, but did not, request that the NASD Director of Arbitration extend the time for him to assert a peremptory challenge to Ms. Wachtel. Pet. App. at 9-10. Nor did Mr. Brown's current counsel, retained in December 1998, ever request such an extension. *Id.* The letter from Mr. Brown's current counsel to the NASD, cited in his Petition (Pet. at 6), "requests the removal of Ms. Wachtel *for cause.*" Pet. at 6-7; D.C. Cir. Jt. App. at JA 0208 (emphasis added). The NASD staff attorney noted in her response to Mr. Brown's counsel that the NASD had *never* received any oral or written challenge to Ms. Wachtel from Mr. Brown's counsel prior to the December 1998 letter requesting her removal for cause. Pet. App. at 57-58. That letter also stated that Ms. Wachtel represented to the parties that her relations with a lawyer in the firm representing Wheat First would not affect her ability to be fair and impartial. Pet. App. at 58. The NASD rejected Mr. Brown's request for removal of Ms. Wachtel for cause. Pet. App. at 10.

When Mr. Brown engaged new counsel in December 1998, both parties jointly requested a postponement of the hearing, then scheduled for March of 1999. Pet. App. at 3. The panel of arbitrators agreed to the postponement and rescheduled the hearing to September 13-17, 1999. *Id.* Pursuant to Arbitration Rule 10319, the arbitrators assessed a $1,500 postponement fee in equal parts - $750 to each party. *Id.*

Mr. Brown's counsel promptly and repeatedly objected to the payment of his share of the postponement fee and any other forum fee, relying on *Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465 (D.C. Cir. 1997). Pet. App. at 3. That case held that arbitration forum fees could not be charged to an employee required to arbitrate federal statutory rights. Pet. App. at 2. Mr. Brown's counsel asserted that the *Cole* holding should apply to the nonstatutory claims he asserted in the arbitration. The arbitrators repeatedly rejected his *Cole* position.

Mr. Brown took the position that the NASD had lost jurisdiction of the proceeding and could no longer render any judgment on the merits. Pet. App. at 17. On September 12, 1999, the Sunday evening before the Monday morning hearing, Mr. Brown sent a submission to the panel in which he stated that he unilaterally "cancelled" his arbitration agreement. Pet. App. at 3.

The next morning, Wheat First's lawyers appeared before the panel of arbitrators with its witnesses and documents, prepared to commence the arbitration proceeding. Pet. App. at 3. Mr. Brown willfully failed to appear without notice to counsel for Wheat First. Pet. App. at 3. Mr. Brown's lawyers were present, not formally on his behalf, but as self-described "concerned members of the public" and attempted to submit to the panel for consideration the "cancellation" notice they had served the night before. Pet. App. at 3. After reviewing this notice, the arbitrators determined that the hearing should proceed as scheduled according to the NASD Code of Arbitration Procedure. Pet. App. at 4, 17. About two months later, on November 9, 1999, the arbitration panel rendered an award, dismissing Mr. Brown's claims with prejudice. Pet. App. at 4.

2. Procedural History of This Litigation

On June 30, 1999, while the arbitration proceeding was still pending and more than two months prior to the scheduled arbitration hearing on September 13, 1999, Mr. Brown filed a complaint in the United States District Court for the District of Columbia. Pet. App. at 4, 12. The claims alleged in the complaint were virtually identical to those he asserted in arbitration. Pet. App. at 17. He demanded $25,000,000 in compensatory and punitive damages, as he had in his arbitration proceeding. "Memorandum of Points and Authorities in Support of Motion To Compel Arbitration, or in the Alternative, To Dismiss the First Amended Complaint for Failure To State a Claim" in the court of appeals at 2. After the arbitration award was handed down, he filed an amended complaint on December 13, 1999. Pet. App. at 17.

Subsequently, on February 29, 2000, Mr. Brown moved to vacate the arbitration award. Pet. App. at 4; "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 2. On March 10, 2000, Wheat First moved to dismiss Mr. Brown's amended complaint and, on March 27, 2000, it cross-moved to confirm the award. Pet. App. at 4; "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 2.

On June 13, 2000, the district court ruled on all the pending motions, denying Mr. Brown's motion to vacate the arbitration award; granting Wheat First's motion to confirm the arbitration award, entering judgment on the award, and dismissing Mr. Brown's common law claims with prejudice; compelling the arbitration of newly-raised claims in Mr. Brown's amended complaint on the basis of a Wheat First motion filed prior to the arbitration award; and dismissing as moot Mr. Brown's amended complaint. Pet. App. at 12-27.

Mr. Brown filed a Notice of Appeal on July 11, 2000, and Wheat First filed a Notice of Cross-Appeal on July 25, 2000. Pet. App. at 4; "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 11. The United States Court of Appeals for the District of Columbia Circuit consolidated the appeals on August 14, 2000. "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 11. On July 31, 2001, the D.C. Circuit affirmed the district court's order confirming the arbitration award, and vacated and remanded the order compelling arbitration of the newly raised claims in the amended complaint with instructions to dismiss the complaint. Pet. App. at 1-11.

Mr. Brown's argument under *Cole* was the centerpiece of his case before the arbitrators and on judicial review. Pet. App. at 7, 19-21. Both the district court and the court of appeals affirmed the arbitrators' rejection of *Cole*. The D.C. Circuit held, on a number of grounds, that the arbitrators had

not lost jurisdiction, "the simplest of which is that Brown's was a *losing Cole* claim." Pet. App. at 9. Mr. Brown does not seek review in this Court of the *Cole* issue.

The district court did not reach the alleged bias issue. With respect to the bias issue, the court of appeals made three major points. First, unlike the present case where the disclosure was made early in the proceeding, the cases cited by Mr. Brown "all involved revelations made after the *award* had been made and are therefore inapplicable here. See, e.g., *Commonwealth Coatings* . . . ." Pet. App. at 10. Second, "Brown fails to show that he requested an extension of the time available to use his peremptory strikes." *Id.* Third, Mr. Brown "requested only removal *for cause*. The NASD rejected this request, and Brown fails to even allege here that the connections disclosed would justify removal for cause." *Id.*

Mr. Brown did not seek rehearing in the court of appeals.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S ARGUMENT REGARDING *COMMONWEALTH COATINGS* IS IRRELEVANT BECAUSE THE D.C. CIRCUIT NEVER CONSIDERED THE "EVIDENT PARTIALITY" STANDARD.

Petitioner is incorrect in his assertion that the D.C. Circuit refused to apply this Court's *Commonwealth Coatings* holding – a decision which interprets "evident partiality" under § 10(b) of the Federal Arbitration Act ("FAA") for vacatur of arbitration awards (9 U.S.C. § 10(b)) – and instead articulated its own "for cause" standard for vacatur of arbitration awards in conflict with other circuits' interpretations. Pet. at 10, 16. The D.C. Circuit never interpreted the FAA's "evident partiality" standard. The court

of appeals ruled that Mr. Brown's motion to vacate failed because he did not request an extension of time to use a peremptory strike and did not support in the court of appeals his motion to remove Ms. Wachtel for cause. Pet. App. at 9-10.

The Rules of the NASD Code of Arbitration Procedure in effect at the time Mr. Brown's arbitration was pending are set forth at Pet. App. 36-41. The Code provides two options to parties seeking to eliminate arbitrators from arbitration panels: (1) the right to one peremptory challenge to be exercised within ten days of notification of the identity of the persons named to the arbitration panel, unless that ten day period is "extended by the Director [of Arbitration]"; and (2) unlimited challenges "for cause" throughout the course of the proceeding. Pet. App. at 37 (Rule 10311(a)).

Mr. Brown never asked the Director of Arbitration to extend the time for him to make his peremptory strike. Pet. App. at 10. In the court of appeals, Mr. Brown argued that the Director should have removed Ms. Wachtel on his own initiative "in the interest of justice."[5] Mr. Brown did make a motion to remove Ms. Wachtel for cause, which was denied, Ms. Wachtel representing that she would be fair and impartial. Pet. App. at 10. But on appeal, Mr. Brown never

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[5] "Brief on Behalf of Mr. Brown Answering Cross-Appellant's Opening Brief and Replying to Appellee's Answering Brief" in the court of appeals at 25. In his court of appeals brief, Mr. Brown cited to Rule 10308(d)(2) of the NASD Code of Arbitration Procedure, which permits the Director of Arbitration to remove an arbitrator based on information that was required to be, but was not, previously disclosed. *Id.* Mr. Brown argued: "This rule contains no requirement that a party move for the Director to remove the tainted arbitrator . . . it merely states that the Director may do so." *Id.* at 25-26. The court of appeals resolved this issue against Mr. Brown. Pet. App. at 10.

argued that the relationship Ms. Wachtel disclosed amounted to disqualification for cause.[6]

Mr. Brown's failure to do so prompted the court of appeals to state, "Brown fails to even allege here that the connections disclosed would justify removal for cause." Pet. App. at 10. The Petition to this Court quotes only the latter portion of this statement, omitting "Brown fails to even allege here," and distorting its meaning. The Petition states merely, "Brown failed to allege 'that the connections disclosed would justify removal for cause.' " Pet. at 16. Of course, the D.C. Circuit did not hold that Mr. Brown had to meet the "traditional *for cause* standard" as the Petition there claims, *id.*; it merely held that Mr. Brown never made any argument before it to support his motion to disqualify Ms. Wachtel for cause. Pet. App. at 10.

Because the D.C. Circuit in this case never ruled on the legal test to be applied in determining whether an arbitration award should be vacated for potential or actual bias, the Petition's entire argument premised on that assumption is irrelevant. The decision of the D.C. Circuit in this case does not conflict with *Commonwealth Coatings* or with any of the other cases cited in the Petition. That stated basis of conflict for seeking review in this Court is not supported.

Moreover, *Commonwealth Coatings*, and virtually all of the other decisions relied upon in the Petition are inapplicable as the D.C. Circuit observed in the proceedings below, because they "involved revelations made after the *award* had been made . . . ." Pet. App. at 10. While Mr. Brown asserts that this is "a distinction without meaning," Pet. at 12, the *Kiernan* decision cited in the Petition illustrates that the distinction is with meaning. *Id.* at 12-13. In that case, where the disclosure was made, as here, pre-award, the United States

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[6] See "Appellant's Brief" in the court of appeals at 35-40, and "Brief on Behalf of Mr. Brown Answering Cross-Appellant's Opening Brief and Replying to Appellee's Answering Brief" in the court of appeals at 24-27.

Court of Appeals for the Eighth Circuit refused to vacate the award because the party had not made timely and appropriate objections.[7] It is obvious that when the disclosure is made for the first time after an award has been issued, the objecting party could not have protected himself during the course of the proceeding through appropriate motions or objections. To permit a party to obtain vacatur of an arbitration award based on information he possessed prior to the award, when he did not take appropriate action on that information during the proceeding, would allow the party to wait and see how the proceeding comes out.

II. ANY BIAS BY MS. WACHTEL COULD NOT HAVE AFFECTED THE ARBITRATION AWARD.

Mr. Brown essentially defaulted by electing not to participate in the arbitration hearing. His reliance on *Cole* for this strategy did not prevail, and the arbitrators' ruling was affirmed by the district court and the court of appeals. Justice Black's observation in *Commonwealth Coatings*, quoted in the Petition (Pet. at 9 (quoting 343 U.S. at 149)), that arbitrators "have completely free rein to decide the law as well as the facts and are not subject to appellate review," does not fit here, where the claimant absented himself from the arbitration proceeding and the arbitrators' ruling on the law was upheld by two courts.

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[7] *Kiernan v. Piper Jaffray Co., Inc.*, 137 F.3d 588 (8th Cir. 1998).

CONCLUSION

The Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

PAUL GONSON
Counsel of Record
STEPHEN G. TOPETZES
REBECCA L. KLINE
ERIN K. ARDALE
KIRKPATRICK & LOCKHART LLP
1800 Massachusetts Ave., N.W.
Second Floor
Washington, D.C. 20036
(202) 778-9000

Attorneys for Respondents

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